REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL NO. 101 OF 2013

J M M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Kyuso Principal Magistrates

Court Criminal Case No. 218 of 2011 by Hon B.M. Mararo, PM on 30/1/2013)

JUDGMENT

1. J M M was charged with the offence of **incest** contrary to **Section 20 (1)** of the **Sexual Offences Act No. 3** of **2006.** Particulars of the offence being that on diverse dates and months of 2009, 2010 and 2011 in **[Particulars Withheld]** sub-location, **Mivukoni** Location **Kyuso** District within **Kitui** County he intentionally touched the vagina of **M M**with his penis who was to his knowledge his daughter.

2. In the alternative he faced a charge of committing an **indecent Act** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3** of **2006.** Particulars of the offence being that on diverse dates and months of 2009, 2010 and 2011 at **Mivukoni** Location, **Kyuso** District within **Kitui** County he intentionally touched the vagina of **M M** a child aged seventeen (17) years with his penis.

3. Having pleaded not guilty he was tried, convicted and sentenced on the alternative count to ten (10) years imprisonment.

4. Being aggrieved by the conviction and sentence, he appealed on grounds that the learned trial magistrate erred in law and fact as he was biased and further by;-

- Failing to record all evidence adduced by the prosecution witnesses on cross-examination by the defence which resulted into him reaching a wrong and biased decision;

- Failing to thoroughly evaluate and interpret evidence hence reaching a decision unsupported by law and evidence; and

- Evidence adduced was full of contradictions and inconsistencies.

5. To prove the case, the prosecution called five (5) witnesses. **PW1, M M** stated that in August, 2009 the appellant, her father found her grazing animals. He coerced her to sleep with him in the bush.

6. In the year 2011 he went into a room in which she was sleeping, held her shoulders requesting to sleep with her but she declined. Her mother and sister **M** found him in the room and sought to know what was happening. The appellant left the room without giving any explanation. The following day she explained to her mother what had transpired but she remained silent. Thereafter her parents disagreed and separated. Her mother went to stay with her grandmother together with her siblings as she remained at their home. On 10th October, 2011 the appellant asked her to sleep with him and she agreed. They slept together the whole night and engaged in sexual intercourse. In the morning both of them were arrested.

7. PW2, S M a sister and daughter to the complainant and appellant respectively stated that in the year 2009 she found the two together in the forest engaging in coitus. On realizing that they had seen her she fled and reported the matter to her mother. When their mother confronted PW1, she denied. Consequently the appellant chased her away together with her sister **N** who was in her company. They went to live with their grandmother. On 13th September, 2011 while in company of their mother they found PW1 and the appellant locked up in the bedroom. As a result her parents disagreed. The appellant chased away her siblings and their mother except PW1.

8. PW3, P S M testified that she got a report in the year 2009 from PW2 and **N** her children that they found PW1 and the appellant having sex in the forest. She decided to investigate. When the appellant learned that **N** had seen them he declined to educate her. She persevered till the year 2011. She returned home on the 13th October, 2011 while in company of **M** to find the appellant with PW1 inside the room. She confronted the appellant and she reported the matter to the police. Their relationship went sour and they separated.

9. PW4, Francis Saku a Clinical Officer examined PW1 on the 17th October, 2011. He found her hymen having been broken previously.

10. PW5, No. 93358 P. C. Florence Nabuya investigated the case and caused the appellant to be charged.

11. When put on his defence the appellant stated that there was a conflict between him and his wife. They disagreed because she used to send her children to take tea at people's houses. She would close her hotel that was adjacent to his shop late; and she had a love affair with a pastor. She deserted her home with her six children leaving **PW1** and **S.** A week later he was arrested and charged. Further, he stated that in the year 2009 he assaulted his wife because she had an extra marital affair but it was alleged that they disagreed because of his relationship with PW1.

12. He called a witness DW2, **Paul Ngei** a landlord to PW3 who stated that he participated in a mediation session after the appellant and PW3 disagreed. He however, failed to reconcile them. The appellant went ahead to take his chairs, shelves, stools and tables that were at PW3's hotel. DW3 **J M** the appellant's Aunt helped to resolve a dispute that had arisen between the appellant and PW3. She denied having heard any allegation in regard to relationship between the appellant and PW1.

13. This being the first appellate court, I am guided by the principles set out in the case of ***Okeno – versus- Republic [1972] E.A. 32*** where it was stated that:-

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya -versus- Republic [1957] E.A. 3 36 and the appellate court's own decision on evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala –versus- Republic [1957] E.A. 570. It is not a function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. (see Peter -versus - Sunday Post [1958] E.A. 424)"***

14. It is submitted by **Mr. Nyamu** counsel for the appellant that the charge is defective and the trial magistrate acquitted the appellant on the basis of the fact that it could not be clearly stated that the appellant was the one responsible for the breaking of the complainant's hymen.

15. It is important to note whether or not the charge was defective, was not a ground of appeal. That notwithstanding the duty of this court being to make its own findings so as to draw its own conclusions, I must interrogate that fact.

16. It is a requirement of the law that a charge as framed must have clear, concise particulars that describe the elements of the offence. The charge as framed contains reasonable information that discloses the nature of the offence the appellant was charged with. The act of indecency the appellant was alleged to have done with his daughter is stated. The only issue raised is the time and dates when the offence was alleged to have been committed. In the case of ***JWA –versus- Republic [2014] eKLR*** the charge sheet was stated to be defective because there was an omission to specify the exact dates on which the offence was committed. It read thus:-

> *"… **on diverse dates between the 15th day of October, 2009 and 21st October…"***

It was held that failure to insert the year in the charge sheet is an omission that neither prejudiced the appellant nor prevented him from understanding the nature and particulars of the offence with which he was charged.

17. In the instant case it is indicated the offence was committed on diverse dates in the months of 2009, 2010 and 2011. This means it was committed in the course of a period of three years. Following particulars stated, the appellant was able to participate in proceedings. His advocate duly cross-examined witnesses who testified and he did present his defence alluding to the duration specified. At no time did they raise an objection to the charge; therefore the appellant having not been prejudiced the omission does not render the charge defective.

18. It has been argued that the appellant should have been acquitted. As per the evidence of PW1, the appellant only touched her shoulders demanding for sex. Evidence of shoulders being not genitalia could not support the conviction.

19. In the alternative count the appellant was stated to have committed an act of indecency by intentionally touching the vagina of PW1. PW1 in her evidence was not specific that the appellant touched her vagina. In reaching a finding that the charge had been proved the court stated thus:-

> ***"PW1 was a victim and she stated that the accused forced her to have sex in the grazing fields in 2009 and again in 2011 the accused made his way to her room and began touching her shoulders inappropriately…"***

These were acts of indecency that the court alluded to.

20. It is however, important to re-look at the charge of incest. The **Sexual offences Act Section 20(1)** provides thus:-

> **"(1)** ***Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:***
>
> ***Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person".***

The particulars of the offence provide that he "***touched the vagina of … with his penis".***

> ***"An indecent act is an unlawful and intentional act which causes; any contact between any part of the body of a person with the genital organ of another…". (****see* ***Section 2 of the Sexual Offences Act, 2006).***

21. It is argued that charges against the appellant were trumped up because of the disagreement he had with the complainant's mother. Evidence adduced however confirms that after the disagreement the complainant remained at their home while her mother and her six (6) siblings were chased away. This was a child who was incapable of framing-up her father.

22. The trial magistrate who had the benefit of observing her demeanour stated that she was forthright in her evidence. She struck him as a sincere and credible witness. It was PW1's testimony that the appellant coerced her to sleep with him in the bush in the year 2009. That is when they had sex. Thereafter they had consensus sex after her mother left their home.

23. The complainant was subjected to medical examination. It was established that she had indulged in sexual intercourse, as her hymen was broken. It could not however be established when it had happened. As correctly submitted, it was PW1's evidence that she had coitus with the appellant prior to being arrested. Lack of proof medically that the complainant had engaged in sexual intercourse just before she was arrested is not detrimental to the prosecution's case. This is because the court can convict on the evidence of the complainant perse as long as it is satisfied that she is truthful. (see ***Okello versus Uganda Criminal Appeal No. 0329 of 2010);*** **section 124** of the ***Evidence Act).***

24. PW3 the mother to the complainant stated that she was born in 1994. This fact was not disputed by the appellant. Therefore as at 2011 the complainant was seventeen (17) years old and at the time she first engaged in sex with the appellant she was fifteen (15) years old. This was a child who was incapable of consenting to any act of sex, therefore not able to appreciate the nature of the act which made it unlawful. (***Vide Section 43 (4) (f) of the Sexual Offences Act).***

25. She stated that they had sex. The court did not interrogate what exactly it meant? The trial magistrate has been faulted for failing to interpret the evidence. Having sex would be interpreted as thrusting a male penis into a female vagina. To do so the penis must come into contact with the vagina. This was an act of indecency which is an ingredient of the offence of incest. It was therefore erroneous on the part of the trial magistrate to acquit the appellant on the main count of incest.

26. For that reasons, it behooves upon me to interfere with the findings of the Lower Court by a altering it. I therefore quash the appellant's conviction and set aside the imposed sentence on the **alternative count** of committing an **indecent act** and convict him on the **main count** of i**ncest** contrary to **Section 20(1)** of the **Sexual Offences Act, 2006.**

27. The child herein (PW1) was under the age of 18 years. According to the proviso to the above stated Section of the law, I do sentence the appellant to **life imprisonment**.

28. Consequently the appeal stands dismissed.

29. It is so ordered.

DATED, SIGNED and **DELIVERED** at **KITUI** this **10TH** day of **FEBRUARY, 2015.**

L.N. MUTENDE

JUDGE